ORIGINAL

NO. 79529-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN

Appellants/Petitioners

v.

HOLLAND AMERICA LINE-USA INC., a Delaware Corporation, and HOLLAND AMERICA LINE INC., a Washington Corporation,

Defendants/Respondents.

HOLLAND AMERICA LINE INC.'S SUPPLEMENTAL BRIEF

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I. FOCUS OF SUPPLEMENTAL BRIEF

In this supplemental brief, Holland America Line-USA, Inc. and Holland America Line, Inc. (Holland America) provides a supplemental analysis of the Court of Appeals decision and provides responses to arguments made by Jack, Bernice and Susan Oltman (collectively, the Oltmans) in their Supplemental Brief.

II. COUNTERSTATEMENT OF THE CASE

The Court of Appeals decision is Oltman v. Holland America Line USA, Inc., 136 Wn. App. 110, 148 P.3d 1050 (2006). Appendix A.

III. ARGUMENT

A. It was Not an Abuse of Discretion to Deny the Oltmans' Motion to Strike Holland America's Affirmative Defenses.

Acknowledging the absence of any supportive legal authority, the Oltmans nonetheless assert that, because Holland America filed their answer and affirmative defenses 31 days instead of 20 days after service of the summons and complaint, Holland America waived their affirmative defenses. (Oltmans' Sup. Br. at 5-8.) The Court of Appeals rejected this argument and rightly so.[1] (Oltman, 136 Wn. App. at 115-16). The remedy for a late answer is a motion for default under CR 55.

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[1] Affirmative defenses are only waived in the rare circumstance where they are neither affirmatively pled, asserted in a CR 12 motion, nor tried by the express or implied consent of the parties. Bickford v. City of Seattle, 104 Wn. App. 809, 17 P.3d 1240 (2001). None of these circumstances exist in this case.

The Oltmans' do not argue that Holland America failed to include the affirmative defense of improper venue when they filed their answer. (Oltmans' Sup. Br. at 5-8.) Holland America unquestionably pled the affirmative defense of improper venue. (CP 30.) Accordingly, the Oltmans cannot meet the plain language requirements of the rule upon which they primarily rely. CR 12(h)(1) only recognizes waiver of the affirmative defense of improper venue if it is omitted from a party's CR 12(b) motion "nor included in a responsive pleading." The affirmative defense was part of a responsive pleading.

Nor were the Oltmans prejudiced by Holland America filing their answer in 31, rather than 20, days after service. The Oltmans claim that, had Holland America filed their answer within 20 days of service, they would have re-filed this matter in federal court, presumably before the one-year limit on filing suit expired.[2] However Holland America would have had to answer one day after the filing of the King County complaint to allow a timely federal court filing. Clearly, the filing of an answer within the permissible 20-day period would have had no effect on the

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[2] Actually doing so would have been difficult and highly unlikely. The King County lawsuit was filed on March 30, 2005, one day before the one year anniversary of the cruise, at which time the case would have been time-barred. See McKinney v. Waterman Steamship Corp., 739 F. Supp. 678 (D. Mass. 1990); Gervais v. United States, 865 F.2d 196, 197 (9th Cir. 1988); CP 306.

analysis once a single day had passed after complaint filing. Simple arithmetic confirms that conclusion. The Oltmans simply waited too long to file and id not give themselves any margin to correct a filing mistake. There is no reason offered for waiting until the last possible day to file their complaint.

As the Court of Appeals noted, the Oltmans "did not produce evidence supporting [their] argument that the case could have been re-filed in the proper court had [Holland America's] answer been filed within 20 days of service." (Oltman, 136 Wn. App. at 115 n.6.) The trial court, therefore, did not abuse its discretion when it denied the Oltmans' motion to strike Holland America's affirmative defenses. The Court of Appeals correctly affirmed the denial.

B. The Refusal to Strike a Declaration of One of Holland America's Attorneys was Proper; Any Error Was Harmless.

The Court of Appeals considered and rejected the Oltmans' argument that Holland America's counsel improperly cited unpublished authority under RAP 10.4(h). It correctly concluded: "Because Holland America's attorney **did not cite unpublished appellate court decisions as authority**, the trial court did not abuse its discretion in denying

Oltman's motion to strike the attorney declaration."[3] (Oltman, 136 Wn. App. at 117) (emphasis added).

The Oltmans point to Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 108 P.3d 1273 (2005) and St. John Med. Ctr. v. State of Washington, 110 Wn. App. 51, 38 P.3d 383 (2002) for support, but neither case affords them relief. In Johnson, the court clearly noted that "Allstate did not cite an unpublished opinion to us, thus we are unable to impose appropriate sanctions." 126 Wn. App. at 519. The court in St. John Medical Center simply did not consider the party's citation to an unpublished trial court, nothing more. 110 Wn. App. at 61 n.5 ("DSHS also cites to an "Order Denying Motion for Remand" in a case from [a U.S. District Court] for support of its argument. As this is an unpublished case, we do not consider it."). These cases do not stand for the proposition that it is improper to cite an unpublished trial court order to a trial court.

Even if it is deemed that the trial court abused its discretion as to this issue, the error was harmless because there is overwhelming published

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[3] The Oltmans still appear to mistakenly assert that Holland America only cited unpublished decisions in the Declaration of Patrick G. Middleton. (Oltmans' Sup. Br. at 8-9.) This is not so. In addition to citing Davis v. Wind Song Ltd., 809 F. Supp. 76 (W.D. Wa. 1996), the declaration also cited Karter v. Holland America Line-Westours, Inc. and Wind Surf Ltd., 1997 A.M.C. 857 (E.D. Wa. 1997). The American Maritime Cases are a compilation of significant maritime decisions widely relied on by courts and attorneys alike.

precedent upholding forum selection clauses.[4] See Northington v. Sivo, 102 Wn. App. 545, 551-52, 8 P.3d 1067 (2000) (erroneously admitted settlement evidence harmless where evidence of liability was "overwhelming").

C. Susan Oltman's Loss of Consortium was Rightly Dismissed Pursuant to Application of the Forum Selection Clause.

The Oltmans' argue that Susan Oltman's claim for loss of consortium is not subject to the forum selection clause because (1) she was neither a cruise ship passenger nor a third-party beneficiary to the contract her husband entered into with Holland America and (2) loss of consortium claims are separate causes of action, not derivative ones. Notwithstanding the Oltmans' lack of supporting authority, the Court of Appeals addressed and properly rejected this argument. (Oltman, 136 Wn. App. at 125-26.)

The Court of Appeals' resolution of this argument is squarely on point with established law. The issue regarding the Oltmans' loss of consortium claim is not whether Susan is entitled to have a separate cause of action but, rather, is "whether a forum selection clause applies to a non-injured spouse who was not a party to the contract limiting litigation rights." (Oltman, 136 Wn. App. at 126 n.18.) The forum selection clause

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[4] See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595-96, 111 S.Ct. 1522, 13 L.Ed.2d 622 (1991); Norwegian Cruise Line Ltd. v. Clark, 841 So.2d 547, 550, 2003 A.M.C. 825, 828 (2003 Fl. Ct. App.); and Colby v. Norwegian Cruise Lines, Inc., 921 F. Supp. 8 (D. Conn. 1996).

that governs the Oltmans' claims that is ultimately dispositive in this case begins:

> **ALL** DISPUTES AND MATTERS **WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT** TO THIS CONTRACT, **THE CRUISE** . . SHALL BE LITIGATED . . .

(CP 109.) (emphasis added.)

It is undisputed that Susan Oltman's sole claim is for loss of consortium and that it is predicated exclusively on Holland America's alleged negligence in connection with her husband's cruise. (CP 9.) Her claim exists solely because it is a result of and is in connection with the cruise. It therefore is governed by the forum selection clause language.

As the Court of Appeals discussed, while a loss of consortium claim is a separate and not a derivative claim, "an element of this cause of actin is the tort committed against the impaired spouse." (136 Wn. App. at 126) (quoting Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 853, 728 P.2d 617 (1986) (in turn quoting Lund v. Caple, 100 Wn.2d 739, 747, 675 P.2d 226 (1984)) (internal quotations omitted). A loss of consortium claim begins to run on the date the underlying injury occurred. As noted by the court in Lieb v. Royal Caribbean Cruise Line, Inc., 645 F. Supp. 232, 235 (S.D.N.Y. 1986), "as a final matter, Mr. Lieb's claim for loss of consortium is equally barred by the statute of limitations contained

in the contract, even though, conceptually his losses may have occurred at a later date." See also, Schenck v. Kloster Cruise Ltd., 800 F. Supp. 120 (S.D.N.J. 1992); Natale v. Regency Maritime Corp., 1995 U.S. Dist. LEXIS 3413 (S.D.N.Y. March 17, 1995) ("Mr. Natale's consortium claim is time-barred for the same reasons as Ms. Natale's claim.").

Moreover, a spouse of a passenger injured outside of state territorial waters cannot recover damages on a loss of consortium claim as a matter of law. Chan v. Society Expeditions, 39 F.3d 1398, 1408 (9th Cir. 1994). Maritime law bars the recovery. Id. It is undisputed that the cruise at issue departed from Valparaiso, Chile, and that the Oltmans allege that Jack and Bernice Oltman knew that they had been exposed to gastrointestinal illness on the High Seas long before the cruise ship reached San Diego. (CP 4, 5, 292, 294.) For these reasons, even if this Court were to accept the Oltmans' argument that Susan Oltman's loss of consortium claim is not subject to the contract and its forum selection clause, existing authority compels the Court to affirm the summary judgment dismissal of her claim as a matter of controlling maritime law.[5]

[5] The Oltmans erroneously assert that the absence of findings of fact and conclusions of law is somehow significant to this Court's de novo review of a summary judgment order. Rather, it is irrelevant. See Boes v. Bisiar, 122 Wn. App. 569, 574, 94 P.3d 975 (2004).

D. The Forum Selection Clause is Valid and Enforceable Under the Reasonable Communicativeness Test.

As this Court has recently determined, under state law, forum selection clauses are prima facie valid.[6] Maritime law is the same. The Oltmans bear a heavy burden of demonstrating that the clause involved in this case is unenforceable. After careful analysis of maritime precedents, the Court of Appeals determined that the Oltmans did not meet this burden. (Oltman, 136 Wn. App. at 119-24.)

A cruise contract forum selection clause is subject to scrutiny for fundamental fairness. Shute, 499 U.S. at 598. This standard requires that the contractual provision be reasonably communicated to the passenger. Id.; Norwegian Cruise Line Ltd. v. Clark, 841 So.2d 547, 2003 A.M.C. 825, 828 (2003 Fl. Ct. App.). The Ninth Circuit's two-pronged "reasonable communicativeness test" answers the question at issue, namely, whether passengers received sufficient notice of the ticket contract's terms. See Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1364 (9th Cir. 1987); Dempsey v. Norwegian Cruise Line, 927 F.2d 998, 999 (9th Cir. 1992).

[6] Dix v. ICT Group, Inc., 160 Wn.2d 826, 834-35, 161 P.3d 1016 (2007) (agreeing that forum selection clauses are prima facie valid and adopting the reasonable communicativeness test to determine the enforceability of a forum selection clause) (citations omitted).

Published decisions have expressly held that the Cruise and Cruisetour Contracts virtually identical to the one at issue in this case meet both prongs of the reasonable communicativeness test. See Davis, 809 F. Supp. at 76 (nearly identical contract issue by sister company of Holland America; passenger had time and incentive to study contract after injury); Cummings v. Holland America Line-Westours, Inc., 1999 A.M.C. 2282 (W.D. WA 1999); Silware v. Holland America Line-Westours, Inc., 1998 A.M.C. 2262 (W.D. WA 1998) (nearly identical contract).

1. The Contract at Issue Meets the First Prong of the Reasonable Communicativeness Test.

The first prong of the reasonable communicative test focuses on the ticket's physical characteristics, including size of type, conspicuousness, clarity of notice on the ticket's face, and ease with which a passenger can read the provisions. Wallis, 306 F.3d at 835. In Wallis, the reference to the liability limitation at issue was "buried six sentences into paragraph 16 in extremely small (1/16 inch) type." Id. at 836. But because the passenger's attention was drawn to the limitations by other features of the ticket contract, the Court found the first prong of the test was met. Id.

Here, the forum selection clause and other relevant features of the Cruise and Cruisetour Contracts are far more conspicuous. The cruise

ticket portion of the contract states that it is a "contract" in large bold capital letters. (CP 287-88.) This designation also appears at page 17 of the Cruise and Cruisetour Contracts issue to the Oltmans. (CP 304.) Even more significantly, this page clearly states at the top right corner that it is the "Passenger's Copy," and that it embodies "Terms and Conditions." (CP 304.) Finally, immediately below the passenger's cabin number, it states in all capital letters:

> ISSUED SUBJECT TO THE TERMS AND CONDITIONS ON THIS PAGE AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY.

(CP 304.)

The terms and conditions on the following pages include, of course, the forum selection clauses at issue. (CP 109.) These clauses are set forth in all capital letters on the same page which states at its top in bold, underlined, and capital letters: "IMPORTANT NOTICE TO PASSENGERS." (CP 109.)

The physical characteristics of the cruise contract involved here satisfy the first prong of the reasonable communicativeness test.

2. The Contract at Issue Also Meets the Second Prong of the Reasonable Communicativeness Test.[7]

According to the Court of Appeals, and as argued in Respondent's Briefing, the second prong of the reasonable communicativeness test is met in this case and the Oltmans have failed to overcome their burden of proving the contract unenforceable.

The second prong turns on the circumstances surrounding the customer's purchase and subsequent retention of the ticket contract. Wallis, 306 F.3d at 836. The relevant surrounding circumstances include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the ticket, and any other notice the passenger received outside of the ticket. Id. Where, as here, passengers are in possession of their ticket contracts from the time of their injury until they provided the contract to their attorney, the second prong of the reasonable communicativeness test is met. Kendall v. Am. Hawaiian Cruises, 704 F. Supp. 1010 (D. Haw. 1989). This is because passengers have ample time from the time of injury to familiarize themselves with the terms of the

[7] Holland America gives notice of the related Western District of Washington decision in Oltman v. Holland America Line Inc. et al., 2006 A.M.C. 2550 (2006), which held that the terms of the same Cruise and Cruisetour Contract in this case reasonably communicated its provisions and was fundamentally fair. The issue in the federal case was the enforcement of a contractual time bar on suit. This decision is on appeal to the Ninth Circuit Court of Appeals.

ticket contract.[8] Id. at 1016. The Oltmans had one year to find the correct forum.

Here, the Oltmans' Cruise and Cruisetour Contract clearly states that it is "ISSUED SUBJECT TO THE TERMS AND CONDITIONS ON THIS PAGE **AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY.**" (CP 304.) The Oltmans' only argument that the second prong is not met is based on circumstances entirely of their own creation. It is undisputed that Jack Oltman unilaterally decided to book a cruise aboard ms AMSTERDAM thirteen days before the cruise was set to depart Chile. (CP 231.) Even if the Oltmans did not receive their travel documents, including their Cruise and Cruisetour Contracts, until about six days before embarkation or at the time they boarded ms AMSTERDAM, that circumstance is immaterial. (CP 232.) Kendall, 704 F. Supp. at 1016. There is no evidence that the Oltmans reviewed the ticket before boarding although there is no dispute they had the tickets.

Even where passengers do not receive their tickets until the time they board the vessel does not render a forum selection clause

[8] This principle holds true even when the relevant portions of the ticket contract are missing. Kendall, 704 F. Supp. at 1017; see also Geller v. Holland America Line, 298 F.2d 618, 619 (2nd Cir. 1962) (upholding enforcement of one year time limit in Holland America's ticket contract where plaintiffs never opened contract mailed to them by travel agent and it was collected on embarkation).

unenforceable for lack of notice. Hodes, 858 F.2d at 911-12. If a passenger's travel agent is in possession of the ticket prior to boarding, the passengers are charged with constructive notice of its terms.[9] Id. at 912.

Where passengers like the Oltmans choose to book only a short time before a cruise, courts routinely enforce forum selection clauses. In Clark, the court, following what it recognized as the majority view, enforced a forum selection clause where the plaintiffs booked their cruise about a month before departure and received their tickets within the cruise line's cancellation penalty period. 2003 A.M.C. at 826. Likewise, in Colby v. Norwegian Cruise Lines, Inc., the court enforced the forum selection clause despite plaintiffs' claim that they never read the ticket and surrendered it before embarking. 921 F. Supp. 86, 88, (D. Conn. 1998). Moreover, "notice of important conditions of a passage contract can be imputed to a passenger who has not personally received the ticket or possession thereof." Gomez v. Royal Carribbean Cruise Lines, 964 F.

[9] A passenger's possession of the cruise ticket contract provides him or her with the opportunity to become "meaningfully informed" of the provision at issue; "the fact that the passenger may not have read the provision is irrelevant." Mills v. Renaissance Cruises, Inc., 1993 A.M.C. 131, 133, (N.D. Cal. 2002) (upholding the enforceability of the limitation of liability provision at issue where plaintiffs had the tickets in their possession for only two weeks but failed to do so). Additionally, a passenger need only receive reasonably adequate notice that a forum selection clause exists and is part of the contract. See Miller v. Regency Maritime Corp., 824 F. Supp. 202 (N.D. Fla. 1992) (plaintiff admitted receiving the ticket but claimed that she did not remember seeing the forum selection clause).

Supp. 47, 50 (D.P.R. 1997). Here the Oltmans had the ticket before boarding.

Of equal importance, from the time of claimed illness, the Oltmans had nearly a year to read the ticket forum selection clause and/or seek the assistance of counsel in doing so, in order to file in the federal forum. The Oltmans waited to the next to the last day when suit would be barred to file a complaint despite having had the ticket for nearly a year. The second prong of the reasonable communicativeness tests is met. There is no obstacle to the enforceability of the forum selection clause which required the Oltmans' to file their case in the Western District of Washington federal court. They had the opportunity to file in a competent forum and could have elected a jury trial as discussed below.

3. The Contract at Issue is Not Unconscionable Under Washington Law Even If It Applied.

Although maritime law applies by U.S. Supreme Court precedent, Washington law is consistent on the issue of "conscionability." As the Court of Appeals correctly pointed out, "'the fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable.'" (Oltman, 136 Wn. App. at 124 n.16) (citation omitted). In any event, the Shute decision is dispositive on this point. The Shute court emphatically rejected the unconscionability argument. 499 U.S. at

589-93. Additionally, the Oltmans cannot claim that litigating in the forum would be so inconvenient as to deprive them of their day in court. They subsequently filed suit in the same city – the Western District of Washington federal court in Seattle. The Oltmans lost their action solely due to their failure to file in the proper forum and within the specified contractual time period.

E. Federal Maritime Law Governs the Cruise Passenger Ticket Contract and Resulting Personal Injury Claims.

Contrary to the Oltmans' assertion,[10] the Court of Appeals properly concluded that federal maritime law controls their claims. (Oltman, 136 Wn. App. at 118.) "A cruise line passage contract is a maritime contract governed by general federal maritime law." Wallis v. Princess Cruises, Inc., 306 F.3d 827 (9th Cir. 2002); see also The MOSES TAYLOR v. Hamons, 71 U.S. (4 Wall) 411, 427, 18 L.Ed. 397 (1867); Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905 (3rd Cir. 1988).[11] This

[10] The Oltmans do not specifically argue for the application of the law of a specific state, perhaps because they are residents of California and North Dakota, booked their trip through a travel agent located in Texas, and the underlying events giving rise to this case occurred at sea off the coast of South America. (See CP 39-40, 231, 235, 238.)

[11] Abrogated on other grounds by Lauro Lines S.R.L. v. Chaser, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

principal has been established law for more 135 years.[12] The MOSES TAYLOR, 71 U.S. (4 Wall) at 427.

A cruise line passenger's claim for personal injury, governed by the general maritime law, also falls within federal court admiralty subject matter jurisdiction. See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991); Beard v. Norwegian Caribbean Lines, 900 F.2d 71 (6th Cir. 1990); Keefe v. Bahamas Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989). The Oltmans' claims could readily have been filed in federal court under diversity or admiralty subject matter jurisdiction. Had they wanted a jury trial, they could have filed a diversity action. Holland America is a Washington corporation and the Oltmans are out of state residents

Significantly, the U.S. Supreme Court decision that specifically enforces forum selection clauses like the one at issue in this case, Shute, begins: "In this admiralty case . . ." (499 U.S. at 587) and continues:

> We begin by noting the boundaries of our inquiry. First, this is a case in admiralty and federal law governs the enforceability of the forum-selection clause we scrutinize.

Shute, 499 U.S. at 590 (citations omitted).

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[12] See, e.g., Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988); Berg v. Royal Caribbean Cruises, Ltd., 1994 A.M.C. 806 (D.N.J. 1992); Schlessinger v. Holland America N.V., 120 Cal.App.4th, 557, 558, 16 Cal.Rptr.3rd 5 (2004).

In the face of 135 years of precedent, the Oltmans argue Guidry v. Durkin, 834 F.2d 1465 (9th Cir. 1987) and Doonan v. Carnival Corp., 404 F. Supp.2d 1367 (S.D. Fla. 2005) show that federal admiralty law does not apply. Both cases are readily distinguishable. In Guidry, the court was faced with a dispute between two civilian engineers working for the U.S. Navy, not a cruise ship, its passengers, or a contract between the two. 834 F.2d at 1467. And, while Doonan involved a cruise ship, the Doonan court explicitly stated:

> Furthermore, courts have found admiralty law applies in personal injury and contract disputes between passengers and injured on cruise ships and the cruise ship companies . . . Therefore, this court finds that . . .it has jurisdiction on the basis of admiralty and that of maritime law governs.

404 F. Supp.2d at 1370 (citations omitted).

Federal maritime law clearly governs all issues with respect to the enforceability of the forum selection clause.

F. The Savings to Suitors Clause Neither Guarantees a Nonfederal Forum[13] nor Trumps a Valid Forum Selection Clause.

While the Savings to Suitors Clause, 28 U.S.C. § 1331(1),[14] gives state courts concurrent jurisdiction of in personam maritime actions (and applying maritime law) this does not mean that the Oltmans' have a right to supersede the federal forum required by the Cruise and Cruisetour Contracts. They agreed to the forum as part of the cruise contract. The forum selection clause here is key and it is the controlling point the Oltmans fail to acknowledge in their savings to suitors clause argument. They contractually bound themselves to the federal forum. The *Shute* decision enforces that contractual arrangement. They bargained away their savings to suitors clause rights just like parties may waive their rights to civil litigation in its entirety and agree to arbitration.

The Oltmans' argument that the savings to suitors clause allows them to choose a state court forum in the face of a valid forum selection clause is grounded primarily on their reading of Little v. RMC Pac. Materials, Inc., (N.D. Cal. July 2005), 2005 U.S. Dist. LEXIS 14338. The

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[13] The savings to suitors clause "does not guarantee [plaintiffs] a nonfederal *forum*." Morris v. T E Marine Corp., 344 F.3d 439, 444 (5th Cir. 2003) (quoting Tenn. Gas. Pipeline v. Houston Cas. Ins., 87 F.3d 150, 153 (5th Cir. 1996) (emphasis in original).

[14] The clause provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1)[a]ny civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

Court of Appeals correctly held that Little is inapposite to the Oltmans' claim because the Little court "did not address a valid forum selection clause in a cruise ship contract." (136 Wn. App. at 125) (citing Little, at 6). Likewise, the other two cases on which the Oltmans rely, Auerback v. Tow Boat U.S., 303 F. Supp.2d 538 (D.C. NJ 2004) and Pendley v. Ferguson-Williams, Inc., (S.D. Tex. May 2007) 2007 WL 1300974, are equally inapplicable. Neither Auerback nor Pendley involved an enforceable forum selection clause in a cruise ship contract.

Finally, Shute held that enforcement of the forum selection clause does not deprive plaintiffs of a "court of competent jurisdiction." 499 U.S. at 595-96. Here, one is provided for in the parties' forum selection clause – the Western District of Washington at Seattle. (CP 109.)

The Oltmans failed to file in the proper forum. They and their attorney had almost one year to read and understand the forum selection clause. They failed to do so.

IV. CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 16 day of October, 2007.

FORSBERG & UMLAUF, P.S.

FILED AS ATTACHMENT TO E-MAIL

John P. Hayes, WSBA #21009

Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing *HOLLAND AMERICA LINE INC.'S SUPPLEMENTAL BRIEF* on the following individuals in the manner indicated:

Mr. Noah Davis
In Pacta, PLLC
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SIGNED this 16th day of October, 2007, at Seattle, Washington.

Nicole Calvert